INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes and resolution involved	3
Statement	5
Argument	12
Conclusion	21

CITATIONS

Cases:	
Bozza v. *United States*, 330 U. S. 160	20
Collins v. *United States*, 20 F. 2d 574	20
Fields v. *United States*, 164 F. 2d 97, certiorari denied, 332 U. S. 851	21
Glickstein v. *United States*, 222 U. S. 139	16
Harris v. *United States*, 273 Fed. 785, certiorari denied, 257 U. S. 646	20
Heike v. *United States*, 227 U. S. 131	16
Jin Fuey Moy v. *United States*, 254 U. S. 189	20
Josephson v. *United States*, No. 535, this Term, certiorari denied, March 15, 1948	12, 21
Melling v. *United States*, 25 F. 2d 92	20
Nardone v. *United States*, 308 U. S. 338	16
Sinclair v. *United States*, 279 U. S. 263	21
United States v. *Josephson*, 165 F. 2d 82, certiorari denied, February 16, 1948, rehearing denied, March 15, 1948, No. 535, this Term	12
Statutes:	
Revised Statutes § 102, as amended, 52 Stat. 942, 2 U. S. C. 192	3
Revised Statutes § 859, as amended, 52 Stat. 943, 28 U. S. C. 634	3, 14, 15, 17
18 U. S. C. 550	20
Miscellaneous:	
House of Representatives Rule XI (q) (2), as amended by Section 121 (b) of the Legislative Reorganization Act of 1946, Pub. L. No. 601, 79th Cong., 2d Sess., 60 Stat. 812, 828 (adopted by the House of Representatives, 80th Congress, H. Res. No. 5, 80th Cong., 1st Sess.)	4, 13

789860—48——1

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 766

EDWARD K. BARSKY ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority (R. 632–643) and dissenting (R. 644–655) opinions in the court of appeals are not yet reported. The opinion of the district court denying the motion for a bill of particulars (R. 14–17) appears at 7 F. R. D. 38; the opinion denying the motion to dismiss the indictment prior to trial (R. 614–624) appears at 72 F. Supp. 58; and the opinion denying the claim of immunity in relation to the admissibility of the stenographic transcript of the hearing before the Congressional Committee (R. 23–31) appears at 72 F. Supp. 165.

JURISDICTION

The judgment of the court of appeals was entered March 18, 1948 (R. 656), and a petition for rehearing was denied March 29, 1948 (R. 657). The petition for a writ of certiorari was filed April 27, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

The principal questions presented are:

1. Whether Public Law 601, prescribing the authority of the Committee on Un-American Activities, is unconstitutional.

2. Whether the books and records which petitioners were directed to produce before the Congressional Committee were pertinent to the inquiry.

3. Whether evidence showing that petitioners appeared before the Congressional Committee and refused to produce the books and records was admitted in violation of R. S. § 859, which extends immunity to "testimony given by a witness" in a Congressional hearing.

4. Whether the evidence supports the verdict of the jury that petitioners could have complied with the subpoenas if they had desired to.

STATUTES AND RESOLUTION INVOLVED

Revised Statutes § 102, as amended, 52 Stat. 942, 2 U. S. C. 192, provides:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

Revised Statutes § 859, as amended, 52 Stat. 943, 28 U. S. C. 634, provides:

> No testimony given by a witness before either House, or before any committee of either House, or before any joint committee established by a joint or concurrent resolution of the two Houses of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege.

House of Representatives Rule XI (q) (2), as amended by Section 121 (b) of the Legislative Reorganization Act of 1946, Pub. L. No. 601, 79th Cong., 2d Sess., 60 Stat. 812, 828 (adopted by the House of Representatives, 80th Congress, H. Res. No. 5, 80th Cong., 1st Sess.), provides:

> The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.
>
> The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.
>
> For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to

require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. Subpenas may be issued under the signature of the chairman of the committee or any subcommittee, or by any member designated by any such chairman, and may be served by any person designated by any such chairman or member.

STATEMENT

Petitioners, members of the Executive Board of the Joint Anti-Fascist Refugee Committee, were convicted in the United States District Court for the District of Columbia on the second count of a two-count indictment for violation of R. S. § 102.[1] Count 2 (R. 5–6) charged that defendants, having been summoned to produce certain records of the Joint Anti-Fascist Refugee Committee before the House Committee on Un-American Activities,[2] appeared before the Committee but failed to produce the records called for as they had power to do and thereby wilfully made default.

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[1] The trial court directed a judgment of acquittal on the first count, which charged the defendants with conspiracy to defraud the United States and to commit an offense against the United States by depriving a Congressional Committee of records called for in subpoenas issued by the Committee (R. 589).

[2] To avoid confusion in referring to the two committees, we shall refer to the Un-American Activities Committee as the "Congressional Committee" and to the other as "JAFRC."

The facts are not in dispute, for none of the defendants testified at the trial and the defense testimony consisted chiefly of character evidence. The Government's evidence falls into two broad categories—testimony showing the issuance and service of the Congressional Committee's summonses on the defendants and their failure to comply, and testimony showing that in undertaking to investigate the Joint Anti-Fascist Refugee Committee the Congressional Committee had ample basis for believing that JAFRC was engaged in propaganda activities of the kind made subject to investigation by the authorizing resolution. Evidence of the first category was adduced in the presence of the jury and the issue was decided by them. The other evidence was heard by the trial judge, who ruled that the books and records in question were pertinent to the matter under inquiry by the Congressional Committee and that the Committee had a reasonable basis for investigating the Joint Anti-Fascist Refugee Committee (R. 607).

The Government's evidence may be chronologically summarized as follows:

The Joint Anti-Fascist Refugee Committee, an unincorporated association (R. 423), has for its avowed purpose the raising and distribution of funds and other activities for the relief of anti-fascist refugees (see R. 536–537). In practice, its governing officials consist of the Executive Board, of which petitioner Barsky is chairman and the

other petitioners are members, and its Executive Secretary, a Miss Helen R. Bryan (see R. 424–425).

Congressman Wood, then Chairman of the Congressional Committee, testified that when he became a member of the Committee in July 1945, an investigation already had been undertaken into the activities of JAFRC (R. 211). As a result of complaints received, the Congressional Committee inquired of the President's War Relief Control Board concerning JAFRC. That Board, which had authorized JAFRC to collect funds, informed the Congressional Committee that it had learned that JAFRC was "carrying on political propaganda, instead of relief, and using the funds that they were collecting from the public for that purpose" and expressed satisfaction that the Congressional Committee was carrying on an investigation, inasmuch as the Board was unable to conduct one (R. 326–327). The Board supplied the Committee with a letter written to it by a Vermont newspaper publisher, in which it was stated that "It is my sincere belief that the Joint Anti-Fascist Refugee Committee is not an American group but one dominated by a foreign government and serving that government's purpose, and that it has as its main purpose the spreading of doctrines and ideas completely in variance with those for which this war is being fought, and with the principles on which this country was founded" (R. 318–319). Congressman Wood further testi-

789860—48——2

fied (R. 338) that they had learned from the State Department "long before the subpoenas were issued that this organization, Joint Anti-Fascist Refugee Committee, had been making applications for transit visas for people to come through this country en route to Mexico, who, upon their investigation, were found to be outstanding Communists * * *." A book written by petitioner Fast stated that JAFRC had financed the return of Tito (R. 327).[3]

With the foregoing information in its files, the Congresssional Committee on December 1, 1945, addressed a letter to JAFRC requesting permission to make a preliminary investigation of its records (R. 214). JAFRC responded by letter signed by petitioner Barsky on December 5, 1945, stating that the request would be considered by the Executive Board (R. 215). In the meantime, on December 4, the Congressional Committee issued its first subpoena in this matter, directing Helen R. Bryan, Executive Secretary, or petitioner Barsky to appear before the Congressional Committee on December 19, 1945, to testify and to produce records showing the receipt and disbursement of money and correspondence with persons outside the United States (R. 221–222). The subpoena was served on Miss Bryan on December 14, 1945 (R. 222), and on the same day the Executive Board of JAFRC met and

[3] "The Incredible Tito," by Howard Fast, published by Magazine House, 114 East 32d Street, New York 16, N. Y.

by resolution, reciting that JAFRC was not a fit subject for investigation by the Congressional Committee, directed petitioner Barsky and Miss Bryan to advise with counsel and to take any necessary steps to protect its rights (R. 540–542). Miss Bryan appeared before the Congressional Committee on January 24, 1946, in response to the subpoena and petitioner Barsky accompanied her, but was not a witness (R. 227). She did not produce the records called for in the subpoena (R. 223).

In the interval between the issuance of the subpoena and Miss Bryan's appearance, the investigation had continued and information was obtained relating particularly to petitioner Barsky, showing that he was an active Communist leader in the Spanish Civil War (see R. 41–98). On the next day, January 25, 1946, a subpoena was issued directing petitioner Barsky to appear and testify and to produce the records previously called for (R. 223–225). Two days before Barsky was scheduled to appear before the Congressional Committee, the Executive Board of JAFRC met and unanimously directed Barsky not to produce the records called for by the subpoena (R. 542–544). Accordingly, Barsky appeared before the Congressional Committee on February 13, 1946, and testified that he did not have possession or custody of the books and records. However, he stated that the Executive Board, of which he was Chairman, did have

ultimate authority to produce the documents which were the subject of the subpoena (R. 427).

At this juncture of the investigation, Mr. Robert C. Alexander, Assistant Chief of the Visa Division of the Department of State, testified before the Congressional Committee on February 15, 1946 (R. 246–258). He stated that JAFRC "was a Communist organization, at least a Communist front organization" (R. 251), because "it has among its members and influential officers or members, a number of persons that we regard as Communists" (R. 252); and that petitioner Barsky was a known Communist, having been on the Executive Committee of the Communist Party in the United States (R. 247). The Congressional Committee also was informed from the files of the President's War Relief Control Board that the Federal Bureau of Investigation had received reports that JAFRC had engaged in political activities in connection with its fund raising campaign and that speakers using sound trucks in New York City had urged the breaking of diplomatic relations between the United States and Spain "and to have also tied in with their appeal labor controversies then current in the New York City area" (R. 306–307).

It was in this context that the Congressional Committee undertook to require the members of the Executive Board, which petitioner Barsky had testified had ultimate control of the books and records of the organization (R. 427), to make

those documents available. On March 29, 1946, subpoenas were issued for all of the defendants, except Barsky who had already been subpoenaed, and for the JAFRC directing them to produce on April 4, 1946, the organization's books and records relating to the receipt and disbursement of money and correspondence and memoranda of communications with persons in foreign countries, for the period from January 1, 1945, to the date of the issuance of the subpoenas (R. 228–229). Each of the defendants was served with a subpoena (R. 134, 136, 137, 142–143, 146–147, 149, 151, 153, 156–157, 161–162, 167), and the organization was served by leaving a subpoena with Miss Bryan, its Executive Secretary (R. 181).

On April 1, 1946, three days before they were required to appear before the Congressional Committee, several of the defendants consulted with one Benedict Wolf, an attorney, and received from him identical written statements to the effect that they could not produce the books and records because they did not have custody of them. Each defendant appeared before the Congressional Committee on April 4, 1946, and each declined to produce the books and records on the ground that Miss Bryan had custody of them. Miss Bryan refused to produce them on the ground that the Congressional Committee had no right to them (R. 230). (See printed transcript of the testimony of witnesses before the Congressional Committee on

April 4, 1946, Government Exhibit 6, pp. 6, 11, 16, 24, 26, 30, 36, 53–54, 61–62, 66, 96–105.)

The jury convicted all sixteen defendants for having failed to produce the books and records and all except Barsky were sentenced to imprisonment for three months and to pay a fine of $500 (R. 32–37). Barksy was sentenced to imprisonment for six months and to pay a fine of $500 (R. 31–32). The trial court suspended execution of the sentences of five of the defendants and they are not parties in the appellate proceedings (see Pet. 8).

On appeal to the United States Court of Appeals for the District of Columbia, the judgments were affirmed, with one judge dissenting. In an exhaustive opinion the court, speaking through Justice Prettyman, reached conclusions substantially in accord with those earlier announced by the Second Circuit in *United States* v. *Josephson,* 165 F. 2d 82, certiorari denied, February 16, 1948, rehearing denied, March 15, 1948, No. 535, this Term.

ARGUMENT

1. The petition for a writ of certiorari in this case renews the arguments concerning the constitutionality of the resolution establishing the congressional committee which were pressed upon this Court in *Josephson* v. *United States,* No. 535, certiorari denied, March 15, 1948. The denial of certiorari came after those arguments had been

rejected upon full and careful consideration by the Second Circuit. And now they have been examined again by another court which has likewise carefully weighed them and found them wanting.[4] Our views, in agreement with these decisions, are set forth in our brief in opposition in the *Josephson* case, pp. 11–18. For the reasons stated in that brief, as well as for the reasons stated by both courts of appeal, we respectfully submit that the contention is without merit.

2. There can be no serious question that having been authorized to investigate "the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries * * *," the congressional committee had ample basis for inquiring into the activities of JAFRC and for demanding production of its records showing receipts and disbursements and communications with persons in foreign countries. As probable cause for its investigation, the congressional committee had in its files information showing that although JAFRC purported to be a relief organization, it was in fact engaged

[4] It may be noted in this respect that on the facts of this case the court below need not have gone any further in its opinion on this issue than the last full paragraph which appears at page 633 of the record. The remaining discussion assumes that questions possibly might have been asked of petitioners which would have demanded disclosure that they are believers in communism or members of the Communist Party. But such questions were not asked, and the case thus does not present that question.

in political propaganda activities. This was attested to by the President's War Relief Control Board. Coupled with this information, the congressional committee had information from a responsible official of the State Department that JAFRC "was a Communist organization" or, at the very least, a "Communist front organization," and that some influential members of JAFRC were known as Communists. And it had other information that petitioner Barsky, Chairman of JAFRC, was an active member of the Communist Party, having been on its Executive Committee. On this information alone—and it was not alone (see *supra,* pp. 6–11)—the congressional committee had a reasonable basis for believing that the propaganda activities in which JAFRC was apparently engaged derived from a foreign source, and that an investigation was therefore warranted. This being so, it obviously was pertinent to the authorized inquiry to start, as the congressional committee did, by seeking to examine those books and records of JAFRC which disclosed the organization's receipts and disbursements and its communications with persons in foreign countries. Both courts below had no difficulty in finding that the congressional committee had sufficient basis for investigating JAFRC and that the subpoenaed books and records were pertinent to the inquiry, and we agree.

3. Revised Statutes § 859 (28 U. S. C. 634) provides that—

> No testimony given by a witness before either House, or before any committee of either House, or before any joint committee established by a joint or concurrent resolution of the two Houses of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege.

When petitioners appeared before the congressional committee they refused to produce the subpoenaed books and records of JAFRC. The transcript of the proceedings before the congressional committee showing this refusal was adduced in evidence at petitioners' trial (R. 370). Relying on the above quoted statute, petitioners urge that the transcript showing their refusal was improperly received in evidence. Curiously, petitioners do not contend that oral testimony showing their refusal to produce the books and records before the congressional committee is also forbidden by R. S. § 859. Indeed, they urge that the Government could prove its case in this manner, and this view, it appears, is dictated by the fact that a contrary argument would place them in the position of arguing that they obtained immunity from prosecution for contempt of the congressional committee, because the grant of immunity forecloses the courts from receiving any evidence showing what they said before the congressional

committee. In our view, if the immunity statute comes into play, it must necessarily extend not only to the stenographic transcript of the proceedings but as well to any other use of the testimony which was given. See *Nardone* v. *United States*, 308 U. S. 338, 340–341. The immunity which is granted is a matter of substance and the form in which the testimony is used—whether it be a stenographic record or an oral report—is immaterial. Thus the critical question which petitioners present is whether Congress by the immunity provision foreclosed the prosecution of petitioners under R. S. § 102 for defiance of one of its committees.

To state the question is to answer it. The trial judge carefully and exhaustively examined the problem (see R. 23–31) and on the basis of the legislative history of the immunity provision, analogous decisions of this Court stating that an immunity provision does not preclude prosecution for perjury in the course of the proceedings,[5] and the plain purpose of the immunity statute, he held that it "does not bar the use of all testimony taken at a Congressional hearing in a prosecution for contempt or conspiracy leading to contempt" (R. 31). The court of appeals adopted the trial judge's opinion on this question (R. 642–643). In our view, no other construction of the statute is reasonably possible.

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[5] *Glickstein* v. *United States*, 222 U. S. 139, 143; *Heike* v. *United States*, 227 U. S. 131, 141.

Moreover, we reach the same result by another approach to the question. In our view, petitioners' statements to the congressional committee declining to produce the books and records were not testimony within the meaning of the immunity statute. Obviously, if petitioners had ignored the subpoenas completely and had so informed the congressional committee by letter, R. S. § 859 would in no way have any application to this case. The situation is hardly any different where, as here, petitioners responded to the subpoenas in person for the purpose of declining to produce the books and records which the congressional committee sought. R. S. § 859 seeks to aid congressional investigations by facilitating the disclosure of information. By no stretch of its purpose or its words can it be said to extend to defiance of a congressional committee by a declination to disclose the information sought. It is difficult to believe that a witness who, having been sworn, refuses to testify before a congressional committee could insist that the transcript of the proceeding could not be received at his trial for contempt of Congress on the ground that this was made immune by R. S. § 859. The present case is no different. Only where testimony called for by the inquiry is given does R. S. § 859 come into play. Any other view would pervert the statute completely so as to grant immunity from prosecution for contempt to those who fail to disclose information, notwithstanding that the plain pur-

pose of the statute is to facilitate the securing of information by extending immunity to facts disclosed before a congressional committee. There is no basis in reason for petitioners' argument that notwithstanding that Congress has provided for the criminal punishment of those who defy its authority, it also has foreclosed the courts from receiving the most persuasive evidence of the violation by extending immunity to petitioners' statements declining to comply with the subpoenas and produce the demanded books and records.

4. Petitioners' argument (Pet. 19–20), in effect, that they were strangers to the books and records and were incapable of producing them hardly justifies comment. The record shows that petitioner Barsky, Chairman of JAFRC, had earlier informed the congressional committee that "the Executive Board would have the ultimate authority to produce the records" (R. 427). The correctness of this statement is borne out by what petitioners as members of the Executive Board did. Thus, on December 14, 1945, when the first subpoena was served on Miss Bryan, the Executive Secretary of the organization, the Executive Board met immediately and formally instructed petitioner Barsky and Miss Bryan to consult with counsel, at the same time denying the authority of the congressional committee to investigate JAFRC (R. 540–542). Miss Bryan did not produce the books and records (R. 223). There-

after a subpoena was served on petitioner Barsky, and two days before he was scheduled to appear before the congressional committee, petitioners met again and this time by formal resolution directed Barsky not to produce the records called for by the subpoena (R. 542–544). It was at this juncture that Barsky justified his failure to comply with the subpoena on the ground that he did not have possession of the books and records and that "ultimate authority" was in the Executive Board. Thereafter, when the members of the Executive Board were directed to produce the books and records, they declined to do so on the ground that Miss Bryan had custody of them.

The short of the matter is that petitioners indisputably could have complied with the subpoenas if they had been so inclined. Their failure to produce the books and records on the ground that they were incapable of complying is directly in the teeth of their formal resolution, acting as the Executive Board, directing petitioner Barsky not to furnish them to the Congressional Committee. Their conduct demonstrates an obvious and studied effort to shift legal responsibility for defying the Congressional Committee from themselves to their subordinate, Miss Bryan.

The trial judge instructed the jury that they could not convict unless they found that each "defendant, alone or in concert with one or more of the defendants, had custody or dominion and

control over such records" (R. 610). And in this respect the jury were further instructed that (R. 610):

> * * * it is the law that when two or more persons act in concert or participate in an illegal activity, each is responsible, irrespective of the part he plays in the activity; or if one person aids or abets, advises, or counsels, or encourages another to commit an offense, he is equally liable under the criminal law with the one who physically commits it. * * *[6]

The jury could not reasonably have concluded other than that the Executive Board was fully capable of producing the books and records and that petitioners acting in concert as members of that Board wilfully refused to honor the demand of the Congressional Committee. The soundness of this conclusion is strikingly illustrated by the fact that these same petitioners who purportedly could not produce the books and records for the Congressional Committee had no

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[6] Since anyone who aids, abets, procures or commands another to commit a crime is liable as a principal (18 U. S. C. 550), it is settled that it is unnecessary that the indictment specifically charge him as an aider and abettor. It is sufficient that the evidence discloses guilt on an aiding and abetting basis and the jury is correctly instructed. That was the situation in *Bozza* v. *United States*, 330 U. S. 160, 164. See *Jin Fuey Moy* v. *United States*, 254 U. S. 189, 192; *Melling* v. *United States*, 25 F. 2d 92, 93 (C. C. A. 7); *Collins* v. *United States*, 20 F. 2d 574, 578 (C. C. A. 8); *Harris* v. *United States*, 273 Fed. 785, 790 (C. C. A. 2), certiorari denied, 257 U. S. 646.

difficulty in offering them, even without a subpoena, at their trial (see R. 233; Pet. 8).[7]

CONCLUSION

In its essential aspects this case is no different from *Josephson* v. *United States, supra.* The reasons which led to the denial of the petition for a writ of certiorari in that case compel the same result here.

Respectfully submitted.

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MAY, 1948.

[7] Petitioners suggest (Pet. 18–19) that the wilfulness required by R. S. § 102 is a specific intent, which they say was not shown. It is plain that they knew that they were required to comply with the subpoenas and that pursuant to advice of counsel they intentionally did not place themselves in compliance. This was wilful misconduct within the meaning of the statute. *Fields* v. *United States*, 164 F. 2d 97, 100 (App. D. C.), certiorari denied, 332 U. S. 851. Pure motive, if petitioners had it, does not relieve them from their intentional misconduct. See *Sinclair* v. *United States*, 279 U. S. 263, 299, which involved a prosecution for refusal to answer a pertinent question at a Congressional inquiry.

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